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In the Supreme Court of the United States

October Term 1940.

STANOLIND PIPE LINE COMPANY, A CORPORATION,
Petitioner,
vs.
OKLAHOMA TAX COMMISSION, COMPOSED OF J. D. CARMICHAEL, HUBERT L. BOLEN AND J. D. DUNN,
Respondent.

Petition for Writ of Certiorari, and Brief in Support Thereof.

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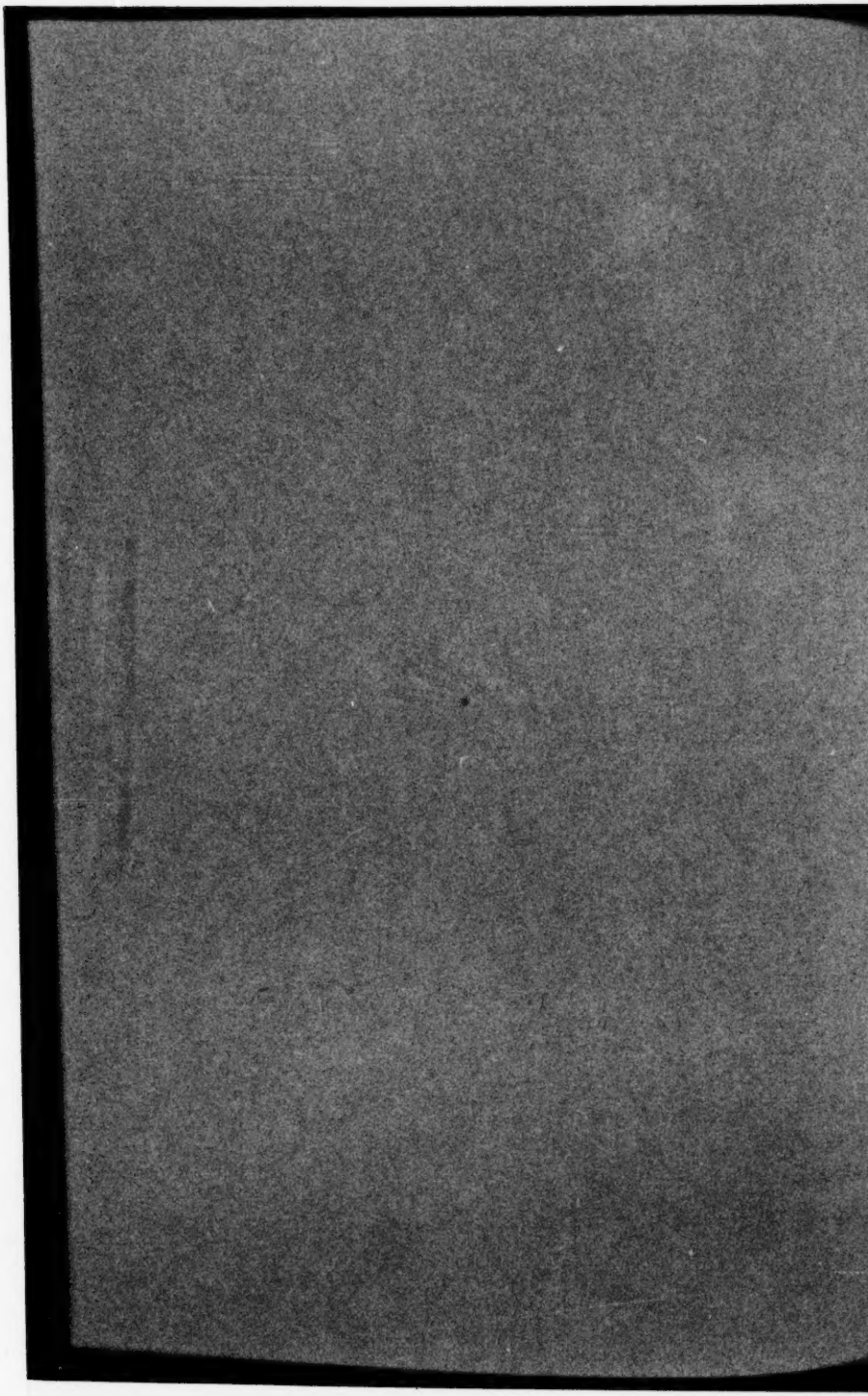

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IN THE SUPREME COURT OF THE UNITED STATES.
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No. .....

STANOLIND PIPE LINE COMPANY, A CORPORATION,
Petitioner,
vs.
OKLAHOMA TAX COMMISSION, COMPOSED OF J. D. CARMICHAEL, HUBERT L. BOLEN AND J. D. DUNN,
Respondent.

PETITION FOR WRIT OF *CERTIORARI* TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE TENTH CIRCUIT.

To the Honorable the Chief Justice and Associate Justices of the Supreme Court of the United States:

Summary Statement of Matter Involved.

This case involves the validity of a statute of Oklahoma (House Bill 589, enacted by the Sixteenth Legislature, approved May 5, 1937, commonly known as the Use Tax Act of 1937, and hereinafter referred to as the "Act") under the Federal Constitution and the Constitution of the State of Oklahoma. It is asserted that the law, as applied to Petitioner, imposed an excise upon the privilege of conducting interstate commerce in violation of and contrary to the Commerce

Clause of the Federal Constitution, Article 1, Section 8, Clause 3. It is further asserted that, if the Act did not levy an excise upon the privilege of conducting interstate commerce, it imposed an ad valorem tax for state purposes in violation of and contrary to Article 10, Section 9, of the Constitution of the State of Oklahoma.

Section 4 of the Act levied an excise tax upon the privilege of using, within the state, any article of tangible personal property purchased, leased, rented or exchanged, at the rate of 2% of the purchase price thereof. The term "purchase price" was defined by Section 3 to mean the consideration paid or given to the seller or transferee of any article of tangible personal property inclusive of the actual cost of transportation from the place of purchase to the person using the same in this state. Section 5 exempted certain classes of property, not here involved, from the tax, and Section 6 provided that, if any property had already been subjected to a use or sales tax by Oklahoma, or any other state, in an amount less than the tax imposed by the Act, the provisions of the Act should not apply, but the tax should be the difference between the rate therein fixed and the rate of the previous tax. The Act was designed to complement an existing Sales Tax levied at the same rate upon articles of tangible personal property purchased, leased, rented or exchanged within the state.

Petitioner owns, maintains and operates a pipe line and pipe line system extending from Texas northward through Oklahoma and other states into Indiana. It receives deliveries of oil from connections in Oklahoma, for transportation to and delivery at points in other states. Its business in and through the State of Oklahoma is exclusively interstate. During the time in question, Petitioner purchased, outside

the State of Oklahoma, articles of tangible personal property consisting of pipe, machinery, repair parts and other articles for the maintenance and upkeep of its pipe line system, and imported such articles into the state to fulfill specific orders for the repair and maintenance of its interstate pipe line system in Oklahoma, and such articles were installed as quickly as possible after their arrival in the state.

Upon demand of the Oklahoma Tax Commission, the excise tax, claimed to be due from Petitioner, for the period from May, 1937, to and including March, 1939, for the privilege of using such tangible personal property, in the sum of Eight Thousand Nine Hundred Eeighty-two Dollars and Twenty-five Cents ($8,982.25), was paid under protest, as provided by law, and this suit thereafter commenced in the United States District Court for the Western District of Oklahoma by Petitioner to recover the amount of said privilege tax, together with interest thereon, as provided by the Act. The Petitioner prevailed and the Commission appealed. Upon review by the United States Circuit Court of Appeals, Tenth Circuit, judgment of the trial court was reversed and the case remanded with directions to enter judgment for the commission, with costs (not officially reported).

This is a petition for a writ of *certiorari* to review the decree of the United States Circuit Court of Appeals for the Tenth Circuit. (Sec. 240 (a) Judicial Code, as amended; Sec. 8 (b), Act of February 13, 1925, 43 Stat. 936, 938 and 940.)

Reasons Relied Upon for the Allowance of the Writ.

1. The decision of the Circuit Court is not in accordance with the decisions of this Court in the following cases, among others:

Helson and Randolph v. *Commonwealth of Kentucky,* 279 U. S. 245;

John D. Bingaman v. *Golden Eagle Western Lines, Inc.,* 297 U. S. 626;

Eureka Pipe Line Co. v. *Hallanan,* 257 U. S. 265;

United Fuel Gas Co. v. *Hallanan,* 257 U. S. 277;

Kansas City, Fort Scott & Memphis Ry. Co. v. *Botkin,* 240 U. S. 227;

Ozark Pipe Line Corp. v. *Monier,* 266 U. S. 555;

Southern Pacific Co. v. *Gallagher,* 306 U. S. 167;

Pacific Telephone and Telegraph Co. v. *Gallagher,* 306 U. S. 182;

Pacific Telephone & Telegraph Co. v. *Henneford,* 81 P. (2d) 786, *certiorari* denied by this court, 306 U. S. 673;

Henneford, et al., v. *Northern Pacific Ry. Co.,* 303 U. S. 16,

on appeal to this Court from a judgment of a Three Judge Court, holding an identical statute of the State of Washington to be a direct burden upon and interference with interstate commerce in violation of the Commerce Clause of the Federal Constitution, was remanded for dismissal solely on the ground that the necessary jurisdictional amount was not involved.

2. The Court below clearly erred in assuming that *Southern Pacific Co.* v. *Gallagher* and *Pacific Telephone and Telegraph Co.* v. *Gallagher, supra,* in effect overruled the decisions of this Court in *Helson and Randolph* v. *Common-*

wealth of Kentucky and *Bingaman* v. *Golden Eagle Western Lines, Inc., supra.*

3. The Circuit Court erred in failing to distinguish the principle of law exemplified by *Helson and Randolph* v. *Commonwealth of Kentucky* and *Bingaman* v. *Golden Eagle Western Lines, Inc., supra,* and other cases following this line of decisions from the principle exemplified in *Nashville C. & St. L. R. Co.* v. *Wallace,* 288 U. S. 249; *Southern Pacific Co.* v. *Gallagher, Pacific Telephone and Telegraph Co.* v. *Gallagher, supra,* and other cases following this line of decisions.

4. The Circuit Court erred in failing to distinguish the excise tax upon the privilege of *using* tangible personal property in the actual consummation of exclusive interstate commerce, levied by the Oklahoma Act, from the tax levied by the California statute upon any right or power incident to the *ownership* of tangible personal property, coming to rest in the state after interstate commerce had ceased and before actual use of such property in interstate commerce, considered by this Court in *Southern Pacific Co.* v. *Gallagher* and *Pacific Telephone Co.* v. *Gallagher, supra.*

5. The Circuit Court committed error in holding that, by implication and interpretation, the Act levied a tax upon "the retention and exercise of the right of installation of the property in question after the termination of its movement in interstate commerce and *before* the beginning of its use and consumption in the interstate business" of Petitioner, thus broadening the taxing scope beyond that expressed by the terms of the Act.

6. The Circuit Court erred in holding that a subsequent Use Tax Act, passed by the Oklahoma Legislature in 1939,

repealing the 1937 Act, here under consideration, and adopting the language of the California statute, after the same had been considered and approved by this Court in *Southern Pacific Co.* v. *Gallagher* and *Pacific Telephone and Telegraph Co.* v. *Gallagher, supra,* and after a decision of the Supreme Court of Washington in *Pacific Telephone and Telegraph Co.* v. *Henneford,* 81 P. (2d) 786, decided July 29, 1938, holding a statute of that state, almost identical with the Oklahoma 1937 Act, offensive to the Commerce Clause of the Federal Constitution, and in which this Court denied *certiorari* February 9, 1939, *Henneford* v. *Pacific Telephone and Telegraph Co.,* 306 U. S. 637, and after this suit had been instituted by Petitioner for recovery of the tax assessed against it under the 1937 Act, amounted to a legislative declaration that the *1937 Act* covered and included taxable events, as defined by the terms of the 1939 Act.

7. It was judicial error for the Circuit Court to deny the contention of Petitioner that the passage and approval of the Oklahoma Use Tax Act of 1939, adopting the identical language of the California Use Tax Act, which had previously been approved by this Court in *Southern Pacific Co.* v. *Gallagher* and *Pacific Telephone and Telegraph Co.* v. *Gallagher, supra,* demonstrated a legislative intent to make a substantial change in the then existing law; that it recognized a substantial difference between the tax levied by the two statutes; that it recognized the fact that the earlier Act was not as comprehensive as the statute in California; and that, taking legislative notice of the decisions of this Court in *Southern Pacific Co.* v. *Gallagher* and *Pacific Telephone and Telegraph Co.* v. *Gallagher, supra,* it sought to change the statute to conform to that in California.

8. The decision of the Tenth Circuit Court in this case is in direct conflict with the view adopted by a Three Judge Court in *Northern Pacific Ry. Co., Inc.*, v. *Henneford, et al.*, 15 Fed. Sup. 302.

9. The decision of the Tenth Circuit Court in this case is in direct conflict with the view adopted by the Supreme Court of the State of Washington in *Pacific Telephone and Telegraph Co.* v. *Henneford, supra,* in which this Court denied *certiorari, Henneford* v. *Pacific Telephone and Telegraph Co., supra.*

10. The Circuit Court erred in holding that the imposition, by the state, of an excise upon the privilege of using instrumentalities employed exclusively in interstate commerce did not constitute such direct and immediate burden upon commerce as to offend the Commerce Clause of the Federal Constitution.

11. If the tax levied by the Act, here under consideration, is not an excise for the privilege of actually using tangible personal property in the conduct of Petitioner's exclusive interstate business, but is a tax upon the retention and exercise of the right of installation after termination of such property's interstate journey and *before* the beginning of its use and consumption in Petitioner's interstate business, measured by the value of the property as represented by the purchase price, inclusive of the cost of transportation, then said levy constitutes an ad valorem tax on property in violation of and contrary to Article 10, Section 12, of the Constitution of Oklahoma, as amended August 15, 1933.

12. Whether the tax be a property tax, an excise, an impost, or any other kind of a duty, it is an ad valorem tax, if measured and determined by value, and thus forbidden

by Article 10, Section 9, of the Constitution of Oklahoma, as amended August 15, 1933.

Wherefore, your Petitioner respectfully prays that a writ of *certiorari* be issued out of and under the seal of this Honorable Court, directed to the United States Circuit Court of Appeals for the Tenth Circuit, commanding that Court to certify and send to this Court, for its review and determination, on a day certain to be therein named, a transcript of the record and proceedings herein; that the decree of the United States Circuit Court of Appeals for the Tenth Circuit be reversed by this Honorable Court; and that your petitioner have such other and further relief in the premises as to this Honorable Court may seem meet and just.

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BRIEF OF STANOLIND PIPE LINE COMPANY IN SUPPORT OF PETITION FOR WRIT OF *CERTIORARI*.

Statement.

The above cause is pending in this court on petition for writ of *certiorari* to the United States Circuit Court of Appeals for the Tenth Judicial Circuit to review the opinion of that court (not officially reported), reversing the opinion of the District Court for the Western District of Oklahoma declaring a statute of Oklahoma (House Bill 589, enacted by the 16th Legislature, approved May 5, 1937, commonly known as the Use Tax Act of 1937, and hereinafter referred to as the "Act") invalid under the Commerce Clause of the Federal Constitution, Article 1, Section 8, Clause 3, as applied to Petitioner. (30 Fed. Supp. 131.)

The following findings of fact and conclusions of law by the trial court, to which Respondent took no exception, are pertinent:

FINDINGS OF FACT.

"During all of the period involved in this suit, Plaintiff, Stanolind Pipe Line Company, owned, maintained and operated a pipe line and pipe line system extending from the State of Texas northward through the State of Oklahoma and other states into the State of Indiana, and received deliveries of oil from connections in Oklahoma exclusively for delivery to points outside the State of Oklahoma." (Tr. 40)

"During the period from May, 1937, to November, 1939, both inclusive, Plaintiff paid under protest, as provided by law, to the Oklahoma Tax Commission as

taxes assessed under the Oklahoma Use Tax Law of 1937, the sum of $8,982.25." (Tr. 41)

"The articles of tangible personal property, consisting of pipe, machinery, repair parts and other items of tangible personal property for the maintenance and upkeep of its pipe line system with respect to the use of which the Oklahoma Use Tax Act was assessed against Plaintiff, were purchased outside the State of Oklahoma to fulfill specific orders for the repair and maintenance of Plaintiff's interstate pipe line system in and through Oklahoma, and said articles were installed as quickly as possible after their arrival into the State of Oklahoma." (Tr. 41)

CONCLUSIONS OF LAW.

"By reason of the diversity of citizenship of the parties hereto and by reason of the fact that the amount involved in controversy exceeds $3,000.00, exclusive of interest and costs, this Court has jurisdiction of this action." (Tr. 41)

"That the business and operations of Plaintiff in connection with the operation and maintenance of its pipe line and pipe line system in and through the State of Oklahoma is exclusively interstate commerce." (Tr. 41)

The findings of fact and conclusions of law quoted are in substantial accord with the stipulation of the parties. (Tr. 39)

Petitioner rests its case on two propositions:

(a) The Act is an excise tax upon the privilege of using tangible personal property in the sense that the property is employed for the accomplishment of a purpose or converted to one's service, and as applied to Petitioner is

a direct and substantial burden upon and interference with its exclusively interstate pipe line business, in violation of and contrary to the Commerce Clause of the Federal Constitution.

(b) If the Act does not levy an excise upon the privilege of use in the sense of employing personal property for the accomplishment of a purpose or converting the property to service, but levies a tax upon storage, keeping or retention of such tangible personal property, or levies a tax upon the incident of ownership, or upon other events prior to converting the property to service in exclusively interstate commerce, then the Act is in violation of and contrary to Article 10, Section 9, of the Constitution of Oklahoma, as amended August 15, 1933.

ARGUMENT *and* AUTHORITIES.

(Emphasis supplied.)

I.

The Oklahoma Use Tax Act of 1937.

The title of the Act, set forth in the Appendix hereto, provided in part "an Act levying an excise tax upon the privilege of using within the State of Oklahoma articles of tangible personal property purchased subsequent to the date of the passage and approval of this Act * * *."

Section 2 declared it to be the purpose of the Act to provide revenue for the support of the functions of state government.

Section 3 defined the meaning of certain terms and phrases when used in the Act. The term "purchase price"

was defined to mean "the consideration paid or given * * * by any person to the Seller of an article of tangible personal property * * *. The term shall include in addition to the consideration paid or given * * * the actual cost of transportation * * *." *The term "use" was not defined in the Act.*

Section 4 of the Article provided: "There is hereby levied and there shall be collected from every person using, within this State, any article of tangible personal property purchased, leased, rented or exchanged subsequent to the date of passage and approval of this Act, an excise tax for the privilege of so using such tangible personal property. Such tax shall be and is hereby levied and shall be collected in an amount equal to two (2%) per centum of the purchase price (as defined in Section 3 of the Act) of such tangible personal property."

Section 5 exempted certain classes of property from the tax; and section 6 provided that if any property had already been subjected to a use or sales tax by Oklahoma or any other state, in an amount less than the tax imposed by the Act, the provisions of the Act should not apply, but the tax should be the difference between the rate therein fixed and the rate of the previous tax. The Act was designed to complement an existing sales tax act which levied a tax at the same rate upon the sale of articles of tangible personal property within the state.

II.

The Act Levies an Excise Upon the Privilege of Use.

The term "use" is not defined in the Act. The Oklahoma Tax Commission, however, under rules and regulations promulgated for the enforcement of the act, defined the term as follows:

"The term 'use' as it appears in the Use Tax Act is hereby defined to be and mean:

"The employment of an article of tangible personal property for the accomplishment of a purpose; to make use of; to treat; to convert to one's service; to avail oneself of; to employ for the attainment of some purpose or end."

It is transparently clear that the legislature intended to enact an excise for the privilege of using within the State of Oklahoma certain articles of tangible personal property purchased, leased, rented or exchanged, subsequent to the passage and approval of the Act. The title of the Act denominated it an excise tax upon the privilege of using. Section 4 of the Act levied an excise for such privilege, measured by a percentum of the purchase price, as elsewhere defined in the Act. Definition of the term "use" contained in the rules and regulations promulgated by the Commission for the enforcement of said act, was an administrative construction of the Act as being an excise upon the privilege of using or employing articles of tangible personal property purchased outside and imported into the state subsequent to the effective date of the Act for the accomplishment or attainment of any purpose.

In *Northern Pacific Ry. Co.* v. *Henneford, et al.*, 15 Fed. Supp. 302, a three-judge court, considering the Use Tax Act of the State of Washington (chapter 180, title 4, Session Laws 1935), containing language almost identical with that used in the Oklahoma law, held that such language operated to levy an excise upon the privilege of using within the state articles of tangible personal property purchased extrastate subsequent to the effective date of the act. The Washington act provided:

> "There is hereby levied and there shall be collected from every person in the state a tax or *excise for the privilege of using* within this state any article of tangible personal property purchased subsequent to April 30, 1935."

In striking down the Washington act, as applied to the interstate business of the Northern Pacific Railway Company, the court said:

> "By the terms of title 4, property is not subject to the compensating tax until it is brought within the state, and *its use within the state is the thing upon which the tax is imposed.*

It was further said:

> "The tax is the *price of the privilege of* using an instrumentality of interstate commerce and as applied to the facts in this case is unconstitutional and void."

The *Northern Pacific* case was brought to this Court and thereafter remanded (January 31, 1938) for dismissal solely on the ground that the necessary jurisdictional amount was not involved. *Henneford, et al.,* v. *Northern Pacific Ry. Co.,* 82 L. ed. 619, 303 U. S. 61.

In the case of *Pacific Telephone and Telegraph Company* v. *Henneford, et al.,* 81 P. (2d) 786, the Supreme Court of the State of Washington (July 29, 1938) accepted the federal court's interpretation of the nature and character of the tax levied by the Washington Use Tax Act of 1935, and, on the ground that such tax was a privilege or excise tax upon the right of the plaintiff to use an instrumentality of interstate commerce, held the tax unconstitutional as applied. Writ of *certiorari* was denied by this Court (February 9, 1939), 83 L. ed. 1038, 306 U. S. 637.

The trial court, in holding the Oklahoma Act invalid under the Commerce Clause as applied to Petitioner, proceeded upon the premise that the Act levied an excise tax upon the privilege of using tangible personal property within the state. *Stanolind Pipe Line Co.* v. *Oklahoma Tax Commission, supra.* It was there said:

> "Clearly, under all of the decisions above quoted, the only 'use' shown in the case at bar is the use in the interstate pipe line equipment, and the tax commission, in its regulations defining the word 'use,' makes no contention that the word 'use' shall have the broad meaning as contained in the California statute—'the exercise of any right or power over tangible personal property incident to the ownership of that property.'
>
> "If the only 'use' complained of is the bringing into the state and installing into the interstate pipe line system the tangible personal property, the basis of the taxation involved in this suit, then clearly this is a use in interstate commerce and is not subject to state taxes."

The court below likewise held that the Act levied an excise upon the privilege of using tangible personal property. *Oklahoma Tax Commission* v. *Stanolind Pipe Line Company, supra.* In passing on this point the court said:

> "It is transparently clear that the tax laid by section 4 of article II was in essence an excise for the privilege of using tangible personal property. *Oklahoma Tax Commission* v. *Sisters of the Sorrowful Mother,* ... Okl. ..., 97 P. (2d) 888; *Vancouver Oil Co.* v. *Henneford,* 183 Wash. 317, 49 P. (2d) 14."

The personel of the Oklahoma Tax Commission has considered and treated the Act as an excise upon only the privilege of using. This is clear from a statement of the Di-

rector, Research Division, Oklahoma Tax Commission, in an address before the National Tax Association at Berkeley, California, on October 17, 1939. Official Proceedings 32nd National Conference, 1939, of the National Tax Association, page 257. It was there stated:

> "Oklahoma's first use tax was levied on the 'privilege of using' any article of tangible personal property, whether such property was 'purchased, leased, rented, or exchanged.' The levying clause of the present law has been broadened to include the 'storage, use or other consumption' of tangible personal property. We should now, consequently, be in a position to collect a use tax on the storage or use of equipment purchased by railroads for use in interstate commerce, under the decision of the U. S. Supreme Court in the *Southern Pacific* case were it not for the fact that, after having broadened the levying clause so as to include the railroads, the legislature granted an outright exemption to railroads in respect of the 'use of tangible personal property by railroads engaged in interstate commerce'."

III.

The tax as applied to petitioner is an unconstitutional burden upon and interference with its right to engage in exclusive interstate commerce.

The use by Petitioner of its pipe lines, pump stations and other equipment and machinery for the accomplishment of its exclusively interstate business of transporting crude petroleum into, out of and through the State of Oklahoma, is, in fact, the use of a composite of various items of tangible personal property purchased within and without the state. Therefore, it must logically follow that a tax by the state upon Petitioner's privilege of using its property is

a direct tax upon the privilege of engaging in interstate business. As was recently said by this Court in *Baldwin* v. *G. A. F. Seelig,* 294 U. S. 511, 522:

> "Imposts and duties upon interstate commerce are placed beyond the power of a state, without the mention of an exception, by the provision committing commerce of that order to the power of the Congress. * * * 'It is the established doctrine of this court that a state may not, in any form or under any guise, directly burden the prosecution of interstate business'."

It is true the Court has recognized the authority of the states to lay taxes for regulation and for the protection of the health and safety of its citizens in the absence of the assumption of such authority by Congress, although interstate commerce is involved. The states have also been permitted to lay taxes upon property within their jurisdiction, although the property had moved in interstate commerce, when it was found that the commerce had ended and that the property had come to rest within the state. *Henneford* v. *Silas Mason Co.,* 300 U. S. 577.

On the other hand it is equally clear that any attempt by the state to lay a tax or excise directly upon the privilege or right to engage in interstate business is in violation of the Federal Constitution. *Eureka Pipe Line Co.* v. *Hallanan,* 257 U. S. 265; *United Fuel Gas Co.* v. *Hallanan,* 257 U. S. 277; *Kansas City, Fort Scott and Memphis Ry. Co.* v. *Botkin,* 240 U. S. 227; *Ozark Pipe Line Co.* v. *Monier,* 266 U. S. 555; *Helson & Randolph* v. *Commonwealth of Kentucky,* 279 U. S. 245; *John D. Bingaman* v. *Golden Eagle Western Lines, Inc.,* 297 U. S. 626.

Plainly, to tax the privilege of using certain items of tangible personal property in the conduct of exclusively in-

terstate business is to impose a direct tax upon the operation of interstate commerce, and is beyond the constitutional power of the state.

The court below argues that the tax imposed by the Use Tax Act of 1937 levies a tax upon events prior to the commencement of interstate commerce, as was the case under the California Use Tax Act, considered by this court in *Southern Pacific Co.* v. *Gallagher, et al.*, 306 U. S. 167, 83 L. ed. 586. Such, however, is not and cannot be true under the Oklahoma act. The Oklahoma act imposes a tax solely upon the privilege of using any article of tangible personal property purchased, leased, rented or exchanged, subsequent to the date of the passage and approval of the act. The Oklahoma law does not provide a statutory definition of the term "use". It was, therefore, incumbent upon the Oklahoma Tax Commission, the administrative body charged with the duty of administering the law, to give the term "use" a meaning and application. This was done by appropriate rules and regulations. As before pointed out, the term "use" was defined to mean "*The employment of an article of tangible personal property for the accomplishment of a purpose; to make use of; to treat; to convert to one's service; to avail oneself of; to employ for the attainment of some purpose or end.*"

It will be seen from the Commission's definition that there is no "use" or "using" of tangible personal property within the meaning and interpretation of the Act until there has been an *employment for the accomplishment of a purpose, an actual treating of property, an actual conversion to one's service, an actual availment of one's self of the property, or an actual employment of the property for the attainment of some purpose or end. The taxable event, under*

the Oklahoma statute, arises upon the actual converting of tangible personal property to one's use for the attainment of a purpose or an end.

In contrast to the provisions of the Oklahoma act and the interpretation given the act by the Oklahoma Tax Commission, let us compare the language of the California statute and the administrative interpretation given thereto, which latter interpretation was involved in *Southern Pacific Co.* v. *Gallagher, et al., supra.* The California act provided:

> "An excise is hereby imposed on the *storage, use* or *other consumption* in this state of tangible personal property purchased from a retailer on or after July 1, 1935, for storage, use or other consumption in this state, at the rate of 3% of the sales price of such property."

It will be noted that under the California act three taxable events were created, namely: *(1)* storage, *(2)* use, and *(3)* other consumption.

With respect to the meaning of the term "storage", the California statute contains the following provision:

> "'Storage' means and includes *any* keeping or retention in this state for *any* purpose except selling in the regular course of business, or subsequent use, solely outside this state of tangible personal property purchased from a retailer."

With respect to the meaning and definition of the term "use," the California statute contains the following provision:

> "'Use' means and includes the exercise of *any right or power* over tangible personal property *incident to the ownership* of that property, except that it shall

not include the sale of that property in the regular course of business."

In this connection, *it will be remembered that the Oklahoma statute does not define "use" or "using," nor does it levy a tax upon "storage, or other consumption."*

Under rules and regulations prescribed by the administrative body charged with the duty of enforcing the California Use Tax Law, it is provided as follows:

> "The fact that tangible personal property is used in interstate or foreign commerce *following its storage* in this state does not exempt the *storage* of the property from tax. Property is deemed to be *stored* in this state if held in this state *any period of time whatever* following the delivery of the property to the purchaser or the termination of the interstate or foreign shipment of the property to the purchaser."

Under the California act and the rules and regulations prescribed for its enforcement, the terms "storage" and "use", *create taxable events prior to the actual conversion or consumption of the tangible personal property for use in the attainment of either interstate or intrastate operations;* that is to say, there was an instant of time between the receipt of the property by the taxpayer and its conversion to interstate purposes. As said by Mr. Justice REED in the majority opinion of the Court:

> "At that moment the tax on storage and use—retention and exercise of a right of ownership, respectively—was effective. The interstate movement was complete. The interstate consumption had not begun."

The distinction between the case at bar and the California case, *supra,* and the distinguishing line of cases ap-

plicable to and controlling under the respective circumstances presented in *Helson & Randolph* v. *Kentucky, supra,* and *Nashville C. St. L. R. Co.* v. *Wallace,* 288 U. S. 249, is forcefully stated in the opinion of the Court in the California case, *supra.* It was there said:

> "There is agreement upon the principle involved. Appellant states that an excise tax imposed directly upon the privilege of using instrumentalities in carrying on interstate transportation is a direct and unconstitutional burden on commerce. Appellees do not dispute the premise but contend that the tax is on intrastate storage and use. *They point to the definition of use as the exercise of a right of ownership, and of storage as any keeping or retention.* By the definitive terms themselves, it is urged, the taxable events are retention and installation, *not such storage as warehousing connotes,* or *use in the sense of consumption or operation.* If we conclude retention and installation, under the circumstances here developed, are intrastate taxable events, viewed apart from commerce, we must still inquire whether taxes laid upon them are not, in effect, upon commerce, and forbidden.
>
> "Two lines of authority aid in considering the effect of this tax on commerce. The first makes it quite clear that *a state tax upon the privilege of operating in, or upon carrying on, interstate commerce is invalid.* States cannot tax interstate telegraph messages, or freight shipments. A license tax on sales by samples burdens one selling only goods from other states. A tax act as applied to the business of interstate communication is unconstitutional. Where a similar levy by other states may be imposed, with consequent multiplicity of exaction on commerce for the same taxable event, local tax of a privilege, measured by total gross receipts from interstate transactions, is considered identical with an exaction on the commerce itself. This

rule is applicable to a tax on gross receipts from interstate transportation; an occupation tax measured by gross receipts from radio broadcasting, and a general tax at specified rates upon the gross income of every resident, construed as 'a tax upon gross receipts from commerce without apportionment.' The measurement of a tax by gross receipts where it cannot result in a multiplication of levies is upheld.

"Appellant selects from this line the *Helson* case as determinative of the contention that a tax on use of supplies or equipment is a tax on the commerce. A state tax of three cents per gallon was imposed on gasoline 'sold at wholesale.' This phrase was defined to include gasoline bought out of the state and used within the state. *There was no definition of the word* 'use or used.' The taxpayers operated an interstate ferry, purchased gasoline in Ohio and used that portion sought to be taxed in propelling their craft in the territorial waters of Kentucky. The court considered the tax on the consumption of the gas the same as a tax on the operation of the ferry boat and therefore invalid under the rule discussed in the preceding paragraph.

"The second line of authority supports the view that use and storage as defined in the California act are taxable intrastate events, separate and apart from interstate commerce. A recent discussion of the topic sets out the precedents in support of a ruling that a tax upon the production of power by the use of which compressors drove natural gas in interstate commerce is valid. Such production is a taxable event *distinct from its consumption in commerce.* Particular attention is called by the state to the *Wallace* case. There the tax was on 'selling or *storing* or distributing gasoline.' It became due on withdrawal from storage. The tax was held applicable to gasoline, purchased out of the state and stored in the state, 'when all is withdrawn and used * * * as a source of motive power in interstate railway

operation' and valid against the objection that 'it is in effect a tax upon the use' in interstate commerce. The invalidity of such a tax arises from a levy on commerce itself or its gross receipts, not upon events prior to the commerce.

"The principle illustrated by the *Helson* case forbids a tax upon commerce or consumption in commerce. The *Wallace* case, and precedents analogous to it, permit state taxation of events preliminary to interstate commerce. The validity of any application of a taxing act depends upon a classification of the facts in the light of these theories."

For aught there appears there was no constitutional or statutory prohibition against state ad valorem taxation in California. Such prohibition is contained in the Oklahoma Constitution, as will be hereinafter discussed.

The foregoing, we believe, forecloses the argument that the Oklahoma act, as applied to tangible personal property being employed in the accomplishment of interstate commerce, falls within the principle and theory of the *Wallace* case; and, by the same token, forcefully demonstrates by a *contra* proposition that the application of the Oklahoma act to the facts and circumstances here presented is without question controlled by the principle and theory exemplified in the *Helson* and similar cases.

The state has no greater constitutional power to impose an excise tax for the use of an instrumentality of interstate commerce than it has to impose an excise tax upon the commerce itself. That things equal to the same thing are equal to each other, is axiomatic.

In *Bingaman* v. *Golden Eagle Western Lines, Inc., supra,* a state statute imposing an excise tax upon the *use* of

gasoline and motor fuel (no storage, or use defined as an incident to the right of ownership, being involved) by a common carrier engaged exclusively in interstate commerce was held invalid as placing a direct burden on interstate commerce. The statute under consideration in the *Bingaman* case (Chap. 176, Art. 2, New Mexico Session Laws of 1933) imposed an excise tax of five cents per gallon upon the sale and *use* of all gasoline and motor fuel. Section 3 of the Act prohibited any "distributor from importing, receiving, *using,* selling or distributing any motor fuel, unless such distributor was the holder of an uncancelled, annual license issued by the state comptroller." A distributor, as defined by the Act, included a corporation consuming and *using* in the state motor fuel purchased in and brought from another state. In holding the act invalid, as applied to the facts presented, the Court said:

> "As applied to appellee, an interstate carrier doing no intrastate business of any description, section 3 of the act, which exacts license fees from distributors, is plainly invalid as imposing a direct burden upon interstate commerce. *Crutcher* v. *Kentucky,* 141 U. S. 47; *International Text Book Co.* v. *Pigg,* 217 U. S. 91."

The principle that a state may not exercise its power to tax unless the activity, which is the subject of the tax, is carried on within the territorial limitations of such state, was sustained in the case of *James* v. *Dravo Contracting Co.,* 302 U. S. 134. To sustain the tax levied by the Oklahoma act, it is necessary to find that there was a taxable activity, as defined by the statute, prior to the consumption of the property in the furtherance of interstate commerce. Such is contrary to the statute itself and to the plain language of the rules and regulations promulgated in aid of the enforcement of the law.

In *Edleman* v. *Boeing Air Transport, Inc.*, 289 U. S. 249, the court sustained a Wyoming tax applied to gasoline imported for use *upon withdrawal from storage*, with respect to gasoline thereafter used by an operator for refueling airplanes flying interstate. The Wyoming tax was held valid on the ground that it applied only to taxable activity, namely, storage and withdrawal from storage *prior to its actual consumption as an instrumentality of interstate commerce.* The court there commented as follows:

> "Issue is joined on the only question raised by the pleadings, whether the taxation of the gasoline, which the respondent withdraws from storage and uses for 'filling' its planes, imposes an unconstitutional burden on interstate commerce. * * *
>
> "As the statute has been administratively construed and applied, *the tax is not levied upon the consumption of gasoline* in furnishing motive power for respondent's interstate planes. *The tax is applied to the stored gasoline* as it is withdrawn from the storage tanks at the airport and placed in the planes. * * *
>
> "Such a tax cannot be distinguished from that considered and upheld in *Nashville, C. & St. L. R. Co.* v. *Wallace.* There it was pointed out that 'there can be no valid objection to the taxation of the exercise of any right or power incident to ownership of gasoline which falls short of a tax directly imposed on its use in interstate commerce, deemed forbidden in *Helson* v. *Kentucky*, 279 U. S. 245.' As the exercise of the powers taxed, *the storage and withdrawal from storage of the gasoline was complete before interstate commerce began,* it was held that the burden of the tax was too indirect and remote from the function of interstate commerce to transgress constitutional limitations."

The *Edleman* case emphasizes the principle that any excise tax levied with respect to interstate commerce is invalid unless for regulation, or unless there is a clear taxable activity prior to the commencement of interstate commerce. It was on this principle that the Supreme Court held the California Use Tax Statute valid and refused *certiorari* to the Supreme Court of Washington in the case of *Pacific Telephone and Telegraph Company* v. *Henneford, et al., supra.* Under the California statute, taxable events and taxable activities were created prior to the actual consumption of the property in the furtherance of interstate commerce; under the Washington statute the actual consumption for the attainment of interstate purposes was the thing made taxable. May we again call attention to the fact that the language of the Oklahoma and Washington acts, regarding the thing to be taxed, is identical.

In *United States Airways* v. *Shaw,* 43 F. (2d) 148 (Oklahoma 1930), a similar question was before the court below. The case concerned the validity of a state excise tax of 4c per gallon on gasoline *consumed* in the state by a company operating airplanes in interstate commerce. It was there held:

> "If the state legislature intended by these enactments to tax gasoline bought in the state and consumed by patrons in the conduct of an interstate transportation business by airplanes; then, whether such consumption occurs within or without the state, the tax operates directly to burden interstate commerce because it is a charge on an instrumentality thereof."

In *Mid-Continent Air Express Corp.* v. *Lujan,* 47 F. (2d) 266 (New Mexico 1931), it appeared that an excise of 5c per gallon was imposed "upon the *use* of all gasoline and

motor fuel *used* in this state for any purpose." Relying on the *Helson* case and *U. S. Airways* v. *Shaw, supra*, the court below held that the gasoline *employed* in interstate business was exempt from the New Mexico tax.

In *Cooney* v. *Mountain States Telephone and Telegraph, Company*, 294 U. S. 384 (1935) this court was called upon to construe a Montana statute imposing a license tax "for each telephone instrument *used*, controlled and operated." It was there held that the tax being laid directly upon an instrumentality of interstate commerce, was a burden upon such commerce and, therefore, repugnant to the Commerce Clause of the Federal Constitution.

In the recent case of *McGoldrick* v. *Berwind-White Coal Mining Co.*, 84 L. ed. 343, it was said:

> "Forms of state taxation whose tendency is to prohibit the commerce or place it at a disadvantage as compared or in competition with intrastate commerce, and any state tax which discriminates against the commerce, are familiar examples of the exercise of state taxing power in an unconstitutional manner, because of its obvious regulatory effect upon commerce between the states."

In upholding the New York City municipal sales tax upon transactions consummated within the limits of the city, as a constitutional exercise of the taxing power of the city, the court, in the case last cited, was careful to point out that the operation of the city tax did not transgress the constitutional prohibition against taxes *imposing a levy for the privilege of doing it.* As to this the court said:

> "Certain types of tax may, if permitted at all, so readily be made the instrument of impeding or destroying interstate commerce as plainly call for their con-

demnation as forbidden regulations. Such are the taxes already noted which are aimed at or discriminate against the commerce or *impose a levy for the privilege of doing it*, or tax interstate transportation or communication or their gross earnings, or levy an exaction on merchandise in the course of its interstate journey. Each imposes a burden which intrastate commerce does not bear, and merely because interstate commerce is being done places it at a disadvantage in comparison with intrastate business or property in circumstances such that if the asserted power to tax were sustained, the states would be left free to exert it to the detriment of the national commerce."

Thus, it must be concluded that a state tax upon the privilege of using articles of tangible personal property in the consummation or attainment of exclusive interstate transportation is such a direct and substantial burden upon and interference with the privilege of conducting such commerce as to offend the Commerce Clause of the Federal Constitution.

IV.

It was not the intention of the legislature to lay a tax upon property or events prior to the commencement of interstate commerce.

The general rule is that taxing statutes are to be construed strictly. *Gould* v. *Gould*, 245 U. S. 151. It is likewise a long settled and general doctrine applicable to all forms of taxation that the legislative body must express its intention to tax in distinct and unambiguous language; the language employed cannot be ascertained by implication beyond its clear meaning. *State of Ohio* v. *Harris*, 229 Fed. 892, *certiorari* denied 242 U. S. 634.

Also, it is a well settled rule of construction that the continued administrative interpretation of a statute and the continued meeting of the legislature, without change or amendment of such statute, as thus interpreted, amounts to a legislative approval of the administrative interpretation thereof and, while such interpretation is not binding upon the courts, it will be strongly persuasive. Conversely, a new and different law, or amendment of an old statute, will indicate a changed legislative intent or disapproval of the administrative interpretation of the old statute. To change the phraseology will create a presumption of a change in intent. *Crawford* v. *Burke,* 195 U. S. 176.

In *U. S.* v. *Atchison, Topeka & Santa Fe R. R. Co.,* 220 U. S. 37, Mr. Justice HOLMES pointed out that the presence of a provision in one part of a statute and its absence in another is an argument against reading it as implied where omitted. This rule is particularly applicable in the interpretation of taxing statutes, and it has been held that where a provision of a statute of another state is adopted, the interpretation placed upon the statute by such other state is adopted with such provision. *Norfolk & W. Ry. Co.* v. *Cheatwood's Admx.,* (Va.) 49 S. E. 489; *James* v. *Appel,* 192 U. S. 129. The court must always be controlled by the power manifest by the act and not by the motive which initiated it. *Berryman* v. *Board of Trustees,* 222 U. S. 334.

The Oklahoma 1937 Use Tax Act was passed by the House and Senate of the State Legislature May 1 and approved by the governor May 5. The Supreme Court of the State of Washington, in *Pacific Telephone and Telegraph Company* v. *Henneford, supra,* on July 29, 1938, held the Washington act invalid under the Commerce clause of the Federal Constitution, as applied to the use of tangible per-

sonal property in the transmission of interstate messages, *certiorari* was denied by this court on February 9, 1939. On January 30, 1939, this court filed its opinion in the case of *Southern Pacific Co.* v. *Gallagher, supra,* sustaining the California tax on the storage and use of tangible personal property temporarily stored in the state although intended for installation as a part of interstate transportation facilities.

On April 14, 1939, the House and Senate of the Oklahoma Legislature passed the Use Tax Act of 1939, which was approved by the governor on April 15, 1939. (Article 12, chapter 66, Laws of 1939.) Section 7 thereof repealed the 1937 Use Tax Act, preserving, however, the right of the State to collect any taxes accruing under the repealed statute. In this connection, the court below asserts that Chapter 66, Laws of 1939, is a complete taxing code. It is true that the various taxing statutes passed by the 1939 Oklahoma Legislature have, for convenience, been codified as Chapter 66, Laws of 1939. Such acts were not passed as a complete tax code, but on the contrary were introduced, passed and approved as separate and distinct legislative acts and at different times during the 1939 session of the Oklahoma Legislature.

The levying section of the Oklahoma 1939 Use Tax Act provides:

> "An excise tax is hereby imposed on the storage, use or other consumption in this state of tangible personal property purchased on or after June 1, 1939, for storage, use or other consumption in this state at the rate of two (2%) per cent of the purchase price of such property. Such tax is hereby levied and shall be collected in an amount equal to two (2%) per cent of the

purchase price, as defined in section 1 above, of such tangible personal property."

With respect to the definition of the term "use", the 1939 Act provides as follows:

> "The term 'use' means and includes the exercise of any right or power over tangible personal property incident to the ownership of that property, except that it shall not include the sale of that property in the regular course of business."

It will be noted that the above language is identical with that used in the California statute. The question at once arises as to the intent of the legislature in repealing outright the 1937 Use Tax Act and substituting for it an act much broader in its terms and entirely different in its definitive provisions. Obviously, the legislature recognized the distinction between the tax levied by the 1937 Act and that levied by the 1939 Act. Clearly it recognized the legal limitations upon the 1937 Act.

If, as reasoned by the Court below, the purpose of the Oklahoma Legislature in passing the 1939 Act had been merely to clarify or to make plain something which it had already intended to do, would it not have amended the 1937 Use Tax Act instead of repealing it and enacting a new one? If the legislature had been sure that the taxing scope of the act was broad enough to include property stored or held prior to consumption in interstate commerce, what was its purpose in repealing the 1937 Act and adopting a new act, much broader in scope, and levying a tax upon a different basis? The inescapable answer is that the legislature of Oklahoma recognized that the 1937 Act was not as comprehensive in its taxing scope as the California Act.

By its passage of the 1939 Act, the Oklahoma legislature evidenced its own intent at the time of the passage of the 1937 Act. It is a cardinal rule of statutory construction in Oklahoma that the intention of the lawmakers when ascertained must govern and that, to ascertain such intention, the various legislative enactments on the particular subject, including any *subsequent enactment*, must be considered, together with and in light of each other. *Board of Commissioners of Creek County* v. *Alexander*, 58 Okl. 128, 159 Pac. 311; *DeHasque* v. *A., T. & S. F. R. R. Co.*, 68 Okl. 183, 173 Pac. 73; *In re Cleveland's Claim*, 72 Okl. 279, 180 Pac. 852.

As statutory provisions which have been repealed or superseded, may be looked to as an aid in the construction of amendatory acts in *pari materia*, so the Court may look to the amendment of a statute, or to a new or substituted statute to ascertain the meaning of the statute as amended or substituted. The presumption is that the legislature, in amending an existing law, or substituting another therefor, intended to make some change in the original. *Swigert* v. *Baker*, 229 U. S. 187.

The rule may be stated thus: By amending the statute the legislature demonstrated an intent to change the pre-existing law, and the presumption must be that it was intended to change the meaning of the statute in all the particulars wherein there is a material change in the language of the amended act.

In *United States* v. *Bashaw*, (C. C. A.) 50 Fed. 749, at page 754, it was said:

> "The very fact that the prior act is amended demonstrates the intent to change the pre-existing law, and the presumption must be that it was intended to change

the statute in all the particulars touching which we find a material change in the language of the act."

The rule is exemplified *In re Segregation of School District No. 58,* (Idaho) 200 Pac. 138:

> "Where changes have been introduced by amendment it is not to be assumed that they were without design; usually an intent to change the law is inferred."

See, also:

Baker v. *Tulsa Building & Loan Association,* 179 Okl. 432, 66 P. (2d) 45;
Searcy v. *State,* 64 Okl. 257, 167 Pac. 476;
Salmon v. *Johnson,* 78 Okl. 182, 189 Pac. 537;
Grayson v. *Thompson,* 77 Okl. 77, 186 Pac. 236;
Mitchell v. *Banking Corporation of Mont.,* (Mont.) 24 P. (2d) 124;
People v. *City and County of Denver,* (Colo.) 272 Pac. 629;
Panico v. *Sperry Eng. Co.,* (Conn.) 156 Atl. 802;
People v. *Weitzel,* (Calif.) 255 Pac. 792.

Apropos of defendant's contention that the 1939 Act which repealed the 1937 Act was merely for the purpose of clarification, we quote from *U. S.* v. *A. J. Woodruff & Co.,* (C. C. A., N. Y.) 175 Fed. 776:

> "Where, as in this case, the statute repeals or replaces an earlier law, any change of language is more consistent with a change of intent than with the purpose of defining or declaring the meaning of the language of the earlier repealed statute."

See, also:

In re Lloyds of Texas, (D. C., Tex.) 43 F. (2d) 383.

The principle was well expressed recently by the Sixth Circuit Court of Appeals in *U. S.* v. *Stroop*, 109 F. (2d) 891, decided February 9, 1940. There it was said:

> "The Congress must be presumed to know the language employed in former acts and the judicial construction placed upon them and if, in subsequent legislation on the same subject, different language is used, there is a presumption of manifest intention to change the law. *Johnson* v. *United States*, 225 U. S. 405, 416, 32 S. Ct. 748, 56 L. ed. 1142. If appellant's contention were sustained, the inclusion of the phrase 'during the taxable year' in the 1928 Act was meaningless and its omission in subsequent Acts unnecessary."

The law and the facts overwhelmingly demonstrate a legislative intent to change the 1937 Act; that the legislature recognized a substantial difference between the tax levied by the California statute and by the Oklahoma law; that it recognized the fact that the earlier Act was not as comprehensive as the statute in California, and that, taking notice of the decisions of this court in *Southern Pacific Co.* v. *Gallagher* and *Pacific Telephone and Telegraph Company* v. *Gallagher, supra*, and the decision of the Supreme Court of Washington, *Pacific Telephone and Telegraph Company* v. *Henneford*, and of the fact that this court denied *certiorari* in the latter case, the legislature sought to change the Oklahoma statute to conform to that in California.

V.

If the Oklahoma Use Tax Act of 1937 is to be construed as a tax on storage or on the retention and exercise of a right of ownership attaching to property after interstate commerce has ceased and before interstate use commences, then it must be held to be an ad valorem tax on property, in violation of the Constitution of the State of Oklahoma.

The decision of the Circuit Court of Appeals is based squarely upon two contradictory and irreconcilable conclusions:

First. The Oklahoma tax is the same kind of tax as the California tax upheld in the *Gallagher* cases;

Second. The Oklahoma tax is an excise tax.

The California tax having been sustained by this Court as a valid property tax, the first conclusion above stated was either erroneous, or the decision reached was wrong, because such a tax would not be valid in Oklahoma, even though valid in California.

If the first conclusion is sound, the second cannot be, for the California tax was sustained as a property tax, and if the Oklahoma tax is the same kind, it could not be an excise.

If the second conclusion is sound, the first conclusion is erroneous, for, as we think, the California tax was sustained as a valid property tax.

The construction and effect of the 1937 Act determined by the Circuit Court of Appeals as the result of the first conclusion above referred to, could not be proper because it runs afoul of a prohibition contained in the Oklahoma Constitution.

The amendment to Article 10, Section 9, of the Constitution of the State of Oklahoma, adopted by the people of the state at a special election on August 15, 1933, provides in part as follows:

> "No ad valorem tax shall be levied for state purposes nor shall any part of the proceeds of any ad valorem tax levy upon any kind of property in this state be used for state purposes * * *."

If the tax can be said to be levied upon the storage, right of control, retention, or ownership of property, and such property has a "taxable moment" and situs within the state, then it would seem that the tax in question would be a property tax, regardless of whether it is called an impost or an excise.

A tax upon any right of ownership or any direct incident thereof, other than that of actual use, is in the nature of a property tax. This is indicated by the language of Mr. Justice Reed in the case of *Southern Pacific* v. *Gallagher, supra.* The "taxable moment" doctrine deals with "property" at the moment the tax is levied. That being true, what is the tax levied against and by what is it measured? It is levied against "property" under either the California or Oklahoma statute (as construed by the Circuit Court of Appeals), and certainly, under the Oklahoma act, it must be determined by the value of the property.

There is nothing to indicate that there were legal prohibitions against ad valorem or property taxation in either of the cases of *Henneford* v. *Silas Mason Co., supra,* or *Southern Pacific* v. *Gallagher, supra.* It is stated in the separate opinion of Mr. Chief Justice Hughes, concurred in by Mr. Justice McReynolds and Mr. Justice Roberts, in

McGoldrick v. *Berwind-White Coal Mining Co., supra,* with respect to the tax in the *Henneford* case:

> "the tax was sustained as one upon property which had come to rest within the state and like other property was subject to its jurisdiction * * * 'the privilege of use is only one attribute, among many, of the bundle of privileges that make up property or ownership'."

After holding that the Oklahoma Gross Production Tax was a privilege or occupation tax, the Supreme Court of Oklahoma later held squarely that it was a property tax.

> —*Protest of Bendelari, Gross Production Tax, 1919,* 82 Okl. 97, 198 Pac. 606;
>
> *In re Skelton Lead and Zinc Company's Gross Production Tax, 1919,* 81 Okl. 134, 197 Pac. 495.

The Supreme Court of Arkansas in *Hixon* v. *School District of Marion,* 187 Ark. 554, 60 S. W. (2d) 1027, forcefully states the principles supporting petitioner's contention:

> "No definition of property can be framed which does not include the right of ownership. Property, therefore, in its broad and legal sense, is not only the physical thing which may be the subject of ownership, but is the ownership itself. The essential attributes of ownership are the rights of dominion, possession, enjoyment, and disposition, 1 Blackstone Com. 138; *Buchanan* v. *Warley,* 245 U. S. 60, 38 S. Ct. 16, 62 L. ed. 149, L. R. A. 1919-C, 210, Ann. Cas. 1918-A, 1201; *Braceville* v. *People,* 147 Ill. 66, 35 N. E. 62, 22 L. R. A. 340, 37 Am. St. Rep. 206; and these rights are included within the protective provisions of the Constitution to the same extent as the physical things to which they pertain, *Terrace* v. *Thompson,* 263 U. S. 197, 44 S. Ct. 15, 68 L. ed. 255. A tax on one of these essential attributes is, therefore, a tax on ownership, and a tax on ownership is a

tax on property. *Thompson* v. *Kreutzer,* 112 Miss. 165, 72 So. 891."

This court has held in a number of cases that taxes measured by earnings were none the less property taxes.

—*United States Express Co.* v. *Minnesota,* 223 U. S. 335, 56 L. ed. 459;

Cudahy Packing Co. v. *Minnesota,* 246 U. S. 450, 62 L. ed. 827;

Pullman Co. v. *Richardson,* 261 U. S. 330, 67 L. ed. 682;

Pollock v. *Farmers Loan & Trust Co.,* 157 U. S. 429, 39 L. ed. 759.

See also:

Thompson v. *McLeod,* 112 Miss. 165, 72 So. 891;

Thompson v. *Kreutzer,* 112 Miss. 165, 72 So. 891;

Sutherland v. *San Diego Electric Railway Co.,* 139 Cal. App. 535, 34 P. (2d) 180;

Alward v. *Johnson,* 208 Cal. 359, 281 Pac. 389.

The case last cited was affirmed by this court.

—*Alward* v. *Johnson,* 282 U. S. 509, 75 L. ed. 496.

These cases, in addition to the language used by this court in the *Gallagher* case, *supra,* squarely support the contention that the use tax levied by the California statute was a property tax and was sustained as such. If the Oklahoma act levies the same kind of tax as that levied by the California statute, the Oklahoma act is in direct contravention of the above quoted provision of the Oklahoma Constitution because it is then a property tax levied upon an ad valorem basis.

The Oklahoma act provides:

"Such tax shall be and is hereby levied, and shall

be collected in an amount equal to two (2%) per centum of the purchase price (as defined in Section 3 of this act) of such tangible personal property. * * * The term 'purchase price' shall mean the consideration paid or given or contracted to be paid or given, by any person to the seller of an article of tangible personal property for the article purchased. The term shall include, in addition to the consideration paid or given or contracted to be paid or given, the actual cost of transportation from the place where the article was purchased to the person using the same in this state."

"Ad valorem" taxes are those levied "according to the value." They are always estimated at a certain per cent of the valuation of the property.

In *Pacific Fruit Express Co.* v. *Oklahoma Tax Commission,* (D. C., Okla.) 27 Fed. Supp. 279, it is said:

"An ad valorem tax has a definite meaning. * * * 'Ad valorem (Latin). According to the valuation. Duties may be specific or ad valorem. Ad valorem duties are always estimated at a certain per cent of the valuation of the property.' 1 Bouv. Law Dictionary, Rawles' Third Revision, page 133.

"'Ad valorem. According to value. Duties are either ad valorem or specific—the former when the duty is laid in the form of a percentage of the value of the property; the latter where it is imposed as a fixed sum on each article or class, without regard to its value. The term "ad valorem tax" is as well defined and fixed as any other used in political economy or legislation, and simply means a tax or duty upon the value of the article or thing subject to taxation.' Black's Law Dictionary."

The requirement that the transporation cost be included in the purchase price, must be held to evidence a design

upon the part of the legislature to provide a method for determining the value of the property as the basis for the tax. In this event, the provision of the statute requiring the inclusion of the cost of transportation to the point of consumption evidences an intent that the value of the property shall be that basis.

Many cases hold that cost, plus transportation, is a fair measure of value. It is certain that the cost of transportation of a thing from the point of acquisition to the actual point of consumption is a part of its ultimate cost to the consumer.

That cost furnishes a measure of value is held in the following cases:

Railroad Commission of Calif. v. *Pacific Gas & Electric Co.*, 302 U. S. 388, 82 L. ed. 319;

Los Angeles Gas & Electrical Co. v. *Ry. Commission*, 289 U. S. 287, 77 L. ed. 1180;

McCardle v. *Indianapolis Water Co.*, 272 U. S. 400, 71 L. ed. 316.

If the above argument is sound, and the Circuit Court of Appeals is correct in holding that the Oklahoma tax is an "excise" tax and not a "property" tax, as also stated by the Supreme Court of Oklahoma in *Oklahoma Tax Commission* v. *Sisters of the Sorrowful Mother*, ... Okl. ..., 97 P. (2d) 888, where the validity of the act was not called in question, then the court in this case was in error in sustaining the tax on the authority of the *Gallagher* cases. If the Oklahoma tax is an excise tax, it would be levied upon the privilege of consuming the property in interstate use and commerce, and, therefore, would offend against the Federal Constitution.

VI.

Whether the tax be a property tax, an excise, an impost, or any other kind of duty, it is an ad valorem tax if measured and determined by value, and thus forbidden by article 10, section 9, of the Constitution of Oklahoma, as amended August 15, 1933.

The Supreme Court of Oklahoma has not passed upon this proposition in connection with the tax here complained of. The question was not raised or presented in the case of *Oklahoma Tax Commission* v. *Sisters of the Sorrowful Mother, supra,* but the Supreme Court of Oklahoma did say in the case of *In re Skelton Lead & Zinc Company's Gross Production Tax, 1919, supra:*

> "Nor does the fact that an occupation tax is levied upon an ad valorem basis render it any the less an occupation tax. This method is quite frequently adopted, and in some cases might be the most just and reasonable measure for such a tax. Both kinds of taxes may be levied upon the same property, and both be levied upon an ad valorem basis, and both be valid. Or both may be invalid; the property tax because it is excessive or discriminatory, and the occupation tax because the state has no power to levy it."

This case was decided before the Oklahoma Constitution was amended to prohibit the levy of ad valorem taxes for the purpose of raising revenue for state purposes, but this in no wise affects the law as announced in that decision. There could be no difference in this respect between an "occupation" tax and an "excise" tax such as is claimed to be here involved. If an occupation tax levied upon a value

basis is an ad valorem tax, then an excise tax levied upon a value basis would be an ad valorem tax. See, also:

State of Maine v. *The Grand Trunk Railway Company of Canada,* 142 U. S. 217, 35 L. ed. 994;
Powell v. *Gleason,* 50 Ariz. 542, 74 P. (2d) 47;
Corn v. *Fort,* 170 Tenn. 377, 95 S. W. (2d) 620.

Conclusion.

We respectfully submit that the Oklahoma Use Tax Act of 1937 is, in fact, an excise tax levied and assessed upon plaintiff's privilege of using property for the conduct of its exclusive interstate business of transporting crude oil by pipe line through and out of the State of Oklahoma, and is, therefore, a burden upon and interference with such business in violation of and contrary to the Commerce Clause of the Federal Constitution. It is further submitted that the Oklahoma Use Tax Act of 1937 is clearly distinguishable from the statutes construed and interpreted in *Nashville C. & St. L. R. Co.* v. *Wallace, supra; Southern Pacific Co.* v. *Gallagher, supra,* and cases controlled by the principle therein announced. This Act, because of its language and administrative definitions and interpretations, is controlled by the principle exemplified by *Helson & Randolph* v. *Kentucky, supra; Pacific Telephone and Telegraph Company* v. *Henneford,* and similar cases.

We further submit that, if the Act here in question is not construed as an excise solely upon the privilege of using, but is considered to be a tax upon storage and use, or upon the retention and exercise of a right of ownership measured by the value of the property, after interstate commerce has ceased and prior to the commencement of inter-

state use, then it must be conceded that the act levies ad valorem tax in violation of Article 10, Section 9, of the State Constitution.

The Circuit Court of Appeals rested its opinion on the decision of this court in *Southern Pacific Co.* v. *Gallagher, supra.* If Petitioner has succeeded in distinguishing the case at bar from the *Southern Pacific* case, then the opinion of the Circuit Court of Appeals should be reversed.

Respectfully submitted,

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APPENDIX.

ARTICLE 11, HOUSE BILL NO. ~~289~~ 589

AN ACT levying an Excise Tax upon the privilege of using, within the State of Oklahoma, articles of tangible personal property purchased subsequent to the date of passage and approval of this Act; providing for certain exemptions; providing for the disposition of the revenue arising hereunder; providing for the collection of the tax levied hereby and the enforcement of this Act by the Oklahoma Tax Commission; providing penalties for the violation of this act; authorizing the promulgation of rules and regulations for the proper administration of this Act by the Oklahoma Tax Commission; providing for refunds; making such taxes and penalties a lien on the taxpayer's property; providing legal remedy for aggrieved taxpayers; defining certain words; providing the provisions of this Act are severable; and declaring an emergency.

"SECTION 1. USE TAX ACT.

"This Act shall be known and cited as the 'Use Tax Act, 1937.'

"SECTION 2. APPORTIONMENT OF FUNDS.

"It is hereby declared to be the purpose of this Act to provide revenues for the support of the functions of the State Government of Oklahoma; and for this purpose and to this end, it is hereby expressly provided that the revenues derived hereunder are hereby apportioned as follows:

"*(a)* Ninety-seven (97%) per centum of such moneys shall be paid into the General Revenue Fund of the State, subject to appropriation by the Legislature for the support of the functions of the State Government.

"*(b)* The remaining three (3%) per centum of such moneys collected under the provisions of this Act shall be paid to the State Treasurer and placed to the credit of the Oklahoma Tax Commission Fund, to be paid out of said fund in payment of expenses necessarily incurred by said Commission in the performance of its lawful duties, and

said funds, or so much thereof as may be necessary, is hereby apportioned for such purposes; *provided,* that any unexpended balance remaining in said fund at the end of any fiscal year shall revert to the General Revenue Fund of the State of Oklahoma.

"SECTION 3. DEFINITIONS.

"The following words, terms, and phrases, when used in this Act, shall have the meanings ascribed to them in this Section, except where the words clearly indicate a different meaning:

"*(a)* The term 'person' shall include any individual, company, partnership, joint venture, joint agreement, association (mutual or otherwise), corporation, estate, trust, business trust, receiver, or trustee appointed by the State or Federal Court or otherwise, syndicate, this State, any county, city, municipality or any other political subdivision of the State, or group or combination acting as a unit in the plural or singular number.

"*(b)* The term 'Commission' shall mean the Oklahoma Tax Commission.

"*(c)* The term 'purchase price' shall mean the consideration paid or given or contracted to be paid or given, by any person to the seller of an article of tangible personal property for the article purchased. The term shall include, in addition to the consideration paid or given or contracted to be paid or given, the actual cost of transportation from the place where the article was purchased to the person using the same in this State. The term 'purchase price' shall also mean the consideration paid or given, or contracted to be paid or given, by the transferee to the transferor, for articles of tangible personal property.

"*(d)* The term 'taxpayer' shall mean any person liable to pay a tax hereunder, or to make a report for the purpose of claiming any exemptions in payment of any tax levied by this Act.

"*(e)* 'Purchase at retail' shall mean and include all purchases except purchases made for the purpose of resale.

"*(f)* The term 'sale' is hereby declared to mean the transfer of either the title or possession for a valuable consideration of tangible personal property regardless of the manner, method, instrumentality or device by which such transfer is accomplished. The term 'sale' is also declared to include the exchange, barter, lease or rental of tangible personal property where such exchange, barter, lease or rental results in either the transfer of the title or the possession.

"*(g)* The term 'purchase' is hereby declared to mean any method whereby a transferee receives from a transferor either the title or possession, for a valuable consideration, of tangible personal property regardless of the manner, method, instrumentality or device by which such transfer is accomplished. The term 'purchaser' is also declared to include the exchange, barter, lease or rental of tangible personal property where such exchange, barter, lease or rental results in either the transfer of the title or the possession to the transferee.

"SECTION 4. TAX LEVIED.

"There is hereby levied and there shall be collected from every person using, within this State, any article of tangible personal property purchased, leased, rented or exchanged subsequent to the date of passage and approval of this Act, an excise tax for the privilege of so using such tangible personal property. Such tax shall be and is hereby levied and shall be collected in an amount equal to two (2%) per centum of the purchase price (as defined in Section 3 of this Act) of such tangible personal property.

"SECTION 5. EXEMPTIONS.

"The provisions of this Act shall not apply:

"*(a)* In respect to the use of any article of tangible personal property brought into the State of Oklahoma by a

nonresident individual, visiting in this State, for his or her personal use or enjoyment, while within the State.

"*(b)* In respect to the use of tangible personal property purchased other than at retail.

"*(c)* In respect to the use of any article of tangible personal property, the sale or use of which has already been subjected to a tax equal to or in excess of that imposed by this Act, whether under the laws of this State, or some other State of the United States.

"*(d)* In respect to the use of tangible personal property purchased during any calendar month, the total cumulative purchase price of which is less than One Hundred ($100.00) Dollars.

"*(e)* In respect to the use of tangible personal property now specifically exempted from taxation under the law of Oklahoma assessing a sales' or consumers' tax upon the sale of tangible personal property.

"*(f)* In respect to the use of any article of tangible personal property brought into the State by an individual with intent to become a resident of this State where such personal property is for such individual's personal use or enjoyment.

"SECTION 6. PROPORTIONAL TAX.

"If any article of tangible personal property has already been subjected to a tax, by this or any other State, in respect to its sale or use, in an amount less than the tax imposed by this Act, the provisions of this Act shall apply to it by a rate measured by the difference only between the rate herein fixed and the rate by which the previous tax upon the sale or use was computed.

"SECTION 7. TAX COMMISSION TO COLLECT.

"The tax hereby levied shall be collected by the Commission.

"SECTION 8. RETURNS.

"Each taxpayer subject to the provisions of this Act shall, on or before the 15th day of every calendar month, file a return with the Commission, on blanks furnished by the Commission, showing in detail the total purchase price of tangible personal property used by him within the State during the preceding calendar month subject to the tax hereinimposed and such other information as the Commission may deem pertinent. Each taxpayer shall remit to the Commission, with each such return, the amount of tax shown thereon to be due. Such return shall be made under oath.

"SECTION 9. PENALTY.

"If the amount of tax imposed by this Act is not paid on or before the date prescribed for its payment, there shall be collected, as a part of the tax, a penalty upon said unpaid amount at the rate of one (1%) per centum per month from the date prescribed for its payment until it is paid. In addition to the above prescribed penalty, there shall be collected an additional penalty of ten (10%) per centum on the tax due when such tax is not paid within a period of thirty (30) days after the final date prescribed for its payment.

"SECTION 10. SAME.

"If any person required to make and file a return by any provision of this Act, fails to file such return within the time required, or files any return which is false or fraudulent in that it contains statements which differ from the quantity or true purchase price of the tangible personal property upon which the use tax herein designated is levied for the taxable period for which said return is made, the Commission shall given ten (10) days' notice, in writing, to such taxpayer to appear before it with such books, records and papers as it may require relating to the business of such taxpayer to give testimony or to answer interrogatories, under oath, administered by the Chairman, or any member of the Oklahoma Tax Commission, respecting the quantity

or purchase price of the tangible personal property, upon the use of which the tax is levied by this Act. If any taxpayer shall fail or refuse to make any such return, or to permit an examination of the books, records or papers of such taxpayer, or shall refuse to appear and answer any question within the scope of such investigation, the Commission may apply to the District Court of the county in which such taxpayer, his agents or employees may be found, or to any judge thereof for an order requiring such taxpayer to make such returns, or requiring the taxpayer, his agents or employees, to appear and answer any such questions or to permit such examination upon the filing of such application, the court or any judge thereof, shall issue an order, upon such reasonable notice as shall be prescribed therein, to be served upon the said taxpayer or agent in charge of his business, directing him to appear for testimony and to produce such records, books and papers as may be required.

"SECTION 11. SAME.

"*(a)* Any person subject to the provisions of this Act failing or refusing to furnish any return herein required to be made, or failing or refusing to furnish a supplemental return, or other data required by the Commission, or who shall violate any other provision of this Act, punishment for which is not otherwise herein provided, shall be deemed guilty of a misdemeanor, and upon conviction thereof, shall be punished by a fine of not less than Twenty-five ($25.00) Dollars, nor more than Two Hundred ($200.00) Dollars, for each such offense.

"*(b)* Any person required to make, file, render, sign or verify any return as aforesaid, who makes any false or fraudulent return with intent to evade the tax hereby levied, shall be deemed guilty of a misdemeanor, and upon conviction thereof, shall be subject to a fine of not less than One Hundred ($100.00) Dollars, nor more than One Thousand ($1,000.00) Dollars, or imprisonment in the county jail

not exceeding one (1) year, or by both such fine and imprisonment.

"The venue of prosecutions arising under the Subsection (a) of this Section shall be either in the county in which the taxpayer resides or wherein such tangible personal property is used; and prosecution arising under the Subsection (b) of this Section shall be maintained in the county where such return was verified or sworn to or where the taxpayer resides.

"SECTION 12. ACTIONS TO COLLECT TAX.

"Independently of all other remedies and proceedings authorized by this Act, for the enforcement of the collection and payment of the tax hereby levied, a right of action by suit, in the name of the State of Oklahoma, on relation of the Oklahoma Tax Commission, is hereby created against the taxpayer, and such suit shall be maintained and prosecuted and all proceedings taken to the same effect and extent as for the enforcement of a right of action for debts; and all provisional remedies available in such action shall be and are hereby made available to the State of Oklahoma in the enforcement of the payment of any tax accruing hereunder.

"SECTION 13. OATHS.

"The Oklahoma Tax Commissioner, or any deputy, agent or employee whom he may designate, shall have the power to administer an oath to any person in respect to any return or report required by this Act, or, by the rules and regulations of the Commission.

"SECTION 14. TAX WARRANTS.

"If any tax imposed by this Act, or any portion of such tax, be not remitted when due, the Commission may issue a warrant under its official seal, directed to the Sheriff of any county of this State, commanding him to levy upon and sell any real or personal property of the taxpayer found within

his county, for the payment of the amount thereof, with the added penalties, interest and costs of executing the warrant and to return such warrant to the Commission and to pay the money collected by virtue thereof by the time to be therein specified, not more than sixty (60) days from the date of the warrant. The Sheriff shall, within ten (10) days after the receipt of the warrant, file with the Court Clerk of the county, a copy thereof and thereupon the Court Clerk shall enter in the judgment docket, in the column for judgment debtors, the name of the taxpayer mentioned in the warrant, and, in the proper columns, the amount of the tax or portion thereof, and interest and penalties for which the warrant is issued, and the date when such copy is filed, and thereupon the amount of such warrant and interest and penalties so docketed shall become a lien upon the title to, and interest in, any real property, of the taxpayer against whom such warrant is issued, in the same manner as a judgment duly docketed in the office of such Court Clerk; and such lien shall be preferred and superior to all mortgages or other liens filed or recorded subsequent to the date such tax lien becomes a matter of record. Such Sheriff, or the person to whom such warrant is directed, shall thereupon proceed in all respects in like effect and in the same manner prescribed by law in respect to executions issued against property upon a judgment of a court of record, and shall be entitled to the same fees for his service in executing the warrant to be collected in the same manner. In cases of failure of any Sheriff to file said copy of the warrant with the Court Clerk as herein prescribed, a certified copy thereof filed by the Commission shall operate with the same effect as if same had been filed by the Sheriff.

"SECTION 15. ACTION BY TAXPAYERS.

"A right of action is hereby created, to afford a remedy at law, for any taxpayer aggrieved by the provisions of this Act; and in case of any such taxpayer resisting the collection of any tax hereby levied, or the enforcement of any

provisions of laws in relation thereto, such taxpayer shall remit the tax and give the Commission notice, at the time, of his intention to file suit for the recovery of same; and upon receipt of such notice, the amount of the tax so remitted shall be segregated and held by the Commission in its depository account with the State Treasury, for a period of thirty (30) days, and if suit be filed within such time for the recovery of such tax, such funds so segregated shall be further held, pending the outcome of such suit. If the taxpayer prevails, the said Commission shall refund the amount of such tax to claimant, plus legal interest thereon at the rate of three (3%) per centum per annum from the date of such payment to the date fixed in the judgment of the Court; which said amount and interest shall be evidenced by the final judgment of the Court having jurisdiction of said suit. Such refund shall be made by cash voucher drawn by the Commission upon its depository account with the State Treasurer.

"This Section shall afford a legal remedy and right of action in any State or Federal Court having jurisdiction of the parties and subject-matter, having full and complete authority to adjudicate any and all cases arising upon the enforcement of this Act as to the legality of any tax accrued, or accruing, or the methods of enforcement thereof. In all such actions, the service of process upon the Oklahoma Tax Commissioner, or in his absence, a deputy Commissioner, shall be sufficient service and the Oklahoma Tax Commission shall be the sole, necessary or proper party defendant in any such suit.

"SECTION 16. RULES AND REGULATIONS.

"It shall be the duty of the Commission to adopt and promulgate and enforce such rules and regulations as will provide methods, devices or plans for the payment and collection of the taxes levied hereunder. The Commission shall design, prepare, print and furnish to all taxpayers, or make available to them, all necessary forms for filing returns and

instruments required for a full collection from taxpayers and accounting for the taxes imposed by this Act.

"SECTION 17. REFUND.

"If any taxpayer, pursuant to the terms of this Act, shall, by reason of clerical error or miscalculation, pay a larger tax for any given period than is due, such taxpayer shall be entitled to a refund of such excess so paid. Such refund, upon approval of claim therefor by the Commission, shall be paid out of the Oklahoma Tax Commission fund, or, if the taxpayer elects so to do, he may receive credit for the amount of such excess tax or taxes subsequently becoming due by the taxpayer under the provisions of this Act; *provided,* no refund shall be made on account of such excess payment unless a claim therefor is filed with the Oklahoma Tax Commission by the taxpayer within one (1) year from the day such excess payment was made.

"SECTION 18. CONSTRUCTION OF ACT.

"If any section, subsection, sentence, clause or phrase of this Act is held to be invalid, the decision shall not affect the validity of the meaning of the remaining portions of this Act. The Legislature hereby declares that it would have passed this Act, and each section, subsection, sentence, clause and phrase thereof, irrespective of the fact that any one or more sections, subsections, sentences, clauses or phrases be declared invalid.

"Approved May 5, 1937. Emergency."

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NO. 430

In the Supreme Court of the United States

OCTOBER TERM, 1940

STANOLIND PIPE LINE COMPANY, a Corporation,
Petitioner,

VERSUS

OKLAHOMA TAX COMMISSION, Composed of J. D. Carmichael, Hubert L. Bolen and J. D. Dunn,
Respondent.

BRIEF OF RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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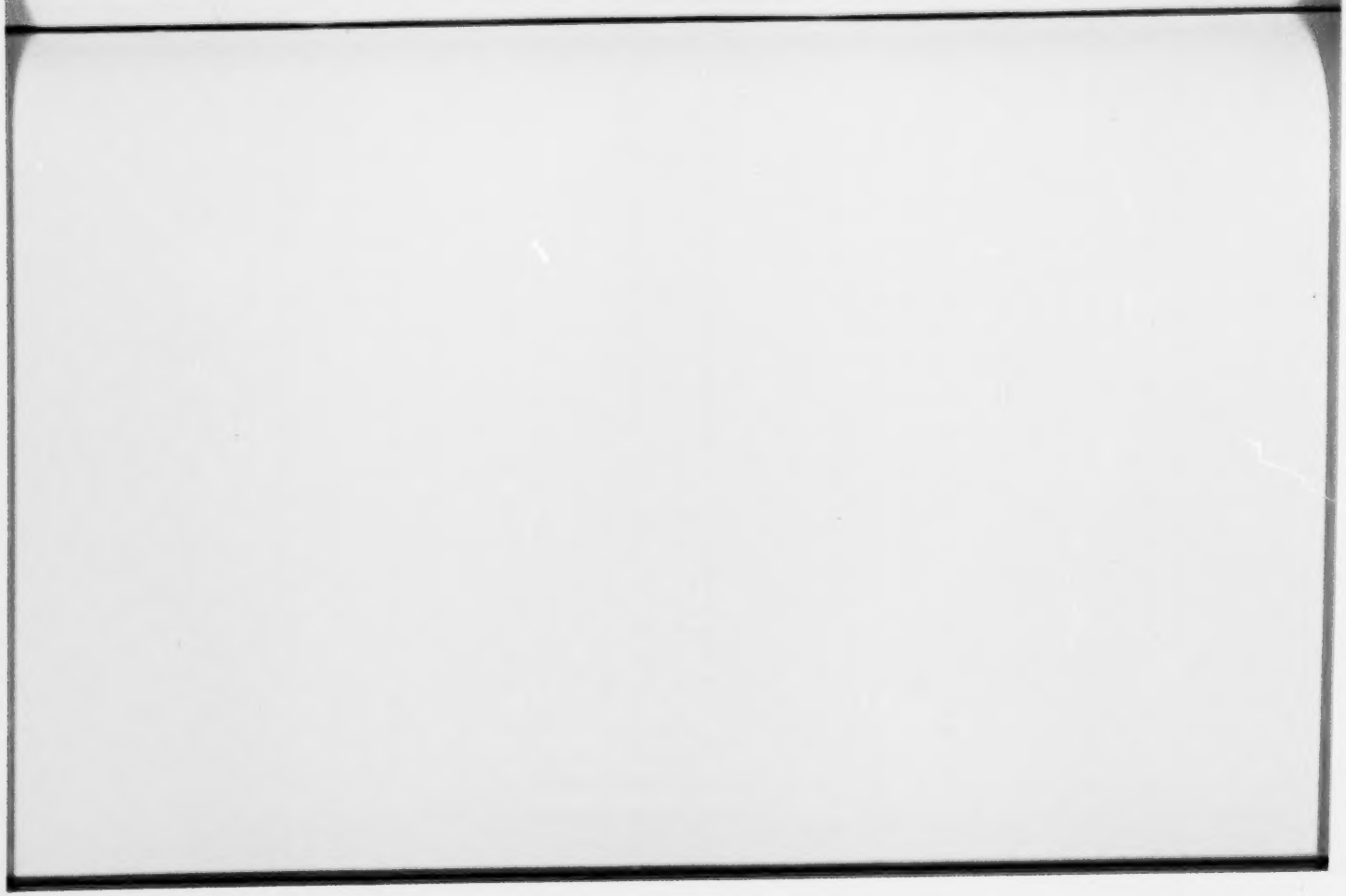

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BRIEF AND ARGUMENT

(Emphasis supplied.)

This case involves the validity of the assessment of a tax against petitioner, under the Oklahoma Use Tax Act of 1937 (Art. 11, Chapter 66, S. L. 1937). This Act appears in full in the appendix to petitioner's brief.

Section 4 of the Act provides:

"There is hereby levied and there shall be collected from every person using, within this State, any article of tangible personal property purchased, leased, rented or exchanged subsequent to the date of passage and approval of this Act, an excise tax for the privilege of so using such tangible personal property. Such

tax shall be and is hereby levied, and shall be collected in an amount equal to two (2%) per centum of the purchase price (as defined in Section 3 of this Act) of such tangible personal property."

The case was submitted to the trial court under stipulation of facts and the pleadings. The facts are fully stated in petitioner's brief and we shall not, in detail, restate them. The facts are, in brief, as follows:

Petitioner is the operator of a pipeline system and is engaged in the State of Oklahoma in the transportation of crude petroleum through and out of the State of Oklahoma exclusively in interstate commerce. Subsequent to the passage of the above Act and between May, 1937, and March, 1939, petitioner purchased certain equipment, consisting of tangible personal property, outside the State of Oklahoma for use in the maintenance, upkeep and repair of its pipeline system. This system was used solely in the conduct of its interstate business. The material imported into the State was installed in its pipeline system immediately after its arrival. It was not retained for any length of time before installation. It was not placed in storage but was, upon its arrival in the State, unloaded and immediately conveyed to the place of installation where it was installed.

The respondent assessed an excise tax equal to two per cent of the purchase price of such material after its arrival in the State. Petitioner contends that the assessment is invalid in that it was a direct tax upon the use of an instrumentality in interstate commerce and, there-

fore, in violation of the Commerce Clause of the Constitution of the United States. It is the contention of respondent that the assessment was made on the use of the property for the purpose of installation, and that the assessment did not attach on such use until after the property arrived in the State, came to rest therein, and before its use in interstate commerce began. The trial court sustained the contention of petitioner and held the assessment invalid (30 Fed. Supp. 131). The Circuit Court of Appeals for the Tenth Circuit, on appeal, reversed the judgment.

It is our contention that the case at bar is controlled by prior decisions of this Court in the cases of *Southern Pacific Co.* v. *Gallagher*, 306 U. S. 167; *Pacific Tel. & Tel. Co.* v. *Gallagher*, 306 U. S. 182; *Nashville C. & St. Louis Ry.* v. *Wallace*, 288 U. S. 249; *Edelman* v. *Boeing Air Transport, Inc.*, 289 U. S. 249.

The Circuit Court based its opinion largely on these cases. In the case of Southern Pacific Company v. Gallagher, *supra*, this Court had under consideration a California statute somewhat similar to our statute. The tax was there sustained. The gist of the opinion is set forth in the headnotes as follows:

> "California tax on storage and use—*i. e.*, upon retention and exercise of ownership—may be applied consistently with the commerce clause and the due process clause of the Fourteenth Amendment to an interstate railroad company in respect of supplies purchased outside of the State and brought in for prompt application in the operation of its road, such as office supplies, and rails, equipment, machinery, tools, etc.,

used in replacements, repairs, and extensions, and including articles ordered out of the State on specifications suitable only for use in the transportation facilities and installed immediately upon arrival at the California destination. P. 172.

"There is an interval after the articles have reached the end of their interstate movement and before their consumption in interstate operation has begun when the 'use and storage' are subject to local taxation. *Helson & Randolph* v. *Kentucky*, 279 U. S. 245, distinguished. P. 176."

In that case the Southern Pacific Company, taxpayer, purchased from without the State certain articles of tangible personal property for installation in connection with its interstate railway system. The tax under the statute was levied upon the use, storage, withdrawal from storage and retention of the property within the State. The tax was assessed on the imported articles after their arrival in the State and before installation. It was there contended, as here, that the tax was assessed upon the privilege of using an instrumentality in interstate commerce and, therefore, violated the Commerce Clause of the Constitution. The court denied this contention and, among other things, at page 177, said:

"We think there was a taxable moment when the former had reached the end of their interstate transportation and had not begun to be consumed in interstate operation. At that moment, the tax on storage and use—retention and exercise of a right of ownership, respectively—was effective. The interstate movement was complete. The interstate consumption had not begun."

We think this reasoning is applicable here. That case was followed by this Court in the case of *Pacific Tel. & Tel. Company* v. *Gallagher*, 306 U. S. 182. The facts are similar. There the property upon which the use tax was assessed was imported from without the State of California and used in the repair of the company's intermingled interstate and intrastate telephone system. The imported articles were installed immediately upon arrival. There was no retention for any period, nor had the property ever reached storage. This Court, nevertheless, sustained the tax and, in disposing of the question, at page 187, said:

> "The appellant exercises two rights of ownership in California—*retention and installation*—after the termination of the interstate shipment and before the use or consumption on its mixed interstate and intrastate telephone system began."

We can see no material distinction between the facts in that case and the facts in the case at bar. The same thing was taxed under the California statute as is taxed under the Oklahoma statute. Therefore, the same reasoning and the same rules of law should apply. Petitioner, however, contends that these cases are not controlling because of the distinction between the Oklahoma statute and the California statute. It is pointed out that under the California statute the tax is upon the use, retention, storage and withdrawal from storage, and that the California statute also defines the term "use," whereas such term is not defined by the Oklahoma statute; nor does the Oklahoma statute purport to assess the tax on the storage and withdrawal from storage of the imported articles.

We do not think the mere fact that the statute levies the tax on the use after importation, and not on the storage or withdrawal from storage, is of any controlling importance. In the California cases, *supra*, most of the imported articles were installed immediately upon arrival in the State; they were not retained in the State for any length of time, nor did any major portion of the imported materials ever reach storage. The tax on such materials was solely on the use. This Court, nevertheless, sustained the tax. It, therefore, appears quite clear to us that the Court would have sustained the tax even though the words "storage" or "withdrawal from storage" had been eliminated from the Act.

The California statute also defines the term "use." The statute here involved does not define such term. The word is defined under the California Act as follows:

> " 'Use' means and includes the exercise of any right or power over tangible personal property incident to the ownership of that property, except that it shall not include the sale of that property in the regular course of business."

We do not think that this statutory definition gives to the term "use" any unusual or extraordinary meaning. This term, we think, naturally has such meaning and means the same whether so defined by statute or not. Therefore, the mere fact that the California statute defines the term "use" to mean that which it means without statutory definition cannot change the result.

While the Oklahoma statute does not define the term "use," under authority granted the Commission under the

Act, the Commission did define, by its Regulations, the word "use" as follows:

> "The term 'Use' * * * means: The employment of an article of tangible personal property for the accomplishment of a purpose; to make use of; to treat; to convert to one's service; to avail oneself of; to employ for the attainment of some purpose or end."

We contend that there is no substantial difference between the definition given the term "use" under the Regulations of the Oklahoma Tax Commission and that given the term under the statute of California. How can one convert property to his own service, or avail himself of such property? How can it be employed for the attainment of some purpose or end without exercising the right or power over such property incident to the ownership thereof? The property in this case was employed for a purpose—for the purpose of installation. When petitioner employed that property for the purpose of installation it exercised the right or power over such property incident to ownership. For what purpose under the California Act did the company exercise any right or power over the property incident to ownership prior to installation, except for the purpose of installation? None whatever.

Here petitioner employed the property for a purpose—the purpose of installation. There is no difference between the thing taxed under the Oklahoma Act and the thing taxed under the California Act. The question as to the validity of the tax depends upon the thing taxed and not upon the choice of words used in the Act.

Speaking on this question, this Court, in *Southern Pacific Company* v. *Gallagher, supra,* at page 177, said:

> *"State taxes upon national commerce or its incidents do not depend for their validity upon a choice of words but upon the choice of the thing taxed."*

This statement is applicable here. As before stated, the thing taxed under the Oklahoma statute is the same as the thing taxed under the California statute. The distinction attempted to be pointed out by counsel for petitioner is, therefore, a distinction without a difference. Speaking on this question the Circuit Court, in its opinion (Tr. 63), says:

> "The company seeks to distinguish this case from Southern Pacific Co. v. Gallagher, and Pacific Tel. & Tel. Co. v. Gallagher, *supra*. The attempted distinction rests upon a supposed substantial difference between the statute and a regulation of Oklahoma and the statute of California. The statute of Oklahoma did not define the term 'use' but it empowered the tax commission to adopt rules and regulations, and by regulations the term was defined to mean 'The employment of an article of tangible personal property for the accomplishment of a purpose; to make use of; to treat; to convert to one's own service; to avail oneself of; to employ for the attainment of some purpose or end.' Section 3 of the statute of California thus defined the term: '"Use" means and includes the exercise of any right or power over tangible personal property incident to the ownership of that property, except that it shall not include the sale of that property in the regular course of business.' See *Southern Pacific Co.* v. *Corbett,* 20 Fed. Supp. 940. The statute of California does not give any unusual or extraordinary meaning to the term, and the definition set

forth in the regulation of the tax commission in Oklahoma does not substantially prescribe its usual and ordinary meaning. The retention and exercise of the right of installation of the property in question after the termination of its movement in interstate commerce and before the beginning of its use and consumption in the interstate business of the company came well within the statute and the regulation promulgated under it."

In this connection, we also call the Court's attention to the case of *Edelman* v. *Boeing Air Transport, Inc.*, 289 U. S. 249. There was before the Court in that case the validity of a statute of Wyoming assessing a use tax on gasoline. Under the facts in that case the air transport company transported certain gasoline from other states and stored it in Wyoming. Such gasoline was there withdrawn from storage, placed in airplanes, and used exclusively in interstate commerce. The tax was assailed on the ground that it was assessed upon an instrumentality used in interstate commerce and, therefore, invalid. The Court denied this contention and, in so doing, among other things, said:

"The statute levies a 'license tax of four cents per gallon * * * on all gasoline used or sold in this State * * * for domestic consumption' and requires every 'wholesaler' engaged in the 'sale or use of gasoline' within the State to report to the state treasurer each month all the gasoline 'sold or used' by it in the State, and to pay the tax upon it. Gasoline 'exported or sold for exportation from the State' is exempted from the tax. A 'wholesaler' is defined as any person (1) who 'imports or causes to be imported gasoline

* * * for sale in the State * * * to the jobber or consumer, or to the persons * * * who, in turn, sell to the jobber or consumer,' or (2) who 'produces, refines, manufactures, blends or compounds gasoline,' in Wyoming 'for use, sale or distribution in this State.' In addition the statute provides that 'every person * * * who shall use any gasoline in this State upon which the said tax has not been paid by any wholesaler in this State,' shall render a like statement and pay a like tax.

* * * * * * * *

"As the statute has been administratively construed and applied, the tax is not levied upon the consumption of gasoline in furnishing motive power for respondent's interstate planes. The tax is applied to the stored gasoline as it is withdrawn from the storage tanks at the airport and placed in the planes. No tax is collected for gasoline consumed in respondent's planes either on coming into the State or on going out. It is at the time of withdrawal alone that 'use' is measured for the purposes of the tax. The stored gasoline is deemed to be 'used' within the State and therefore subject to the tax, when it is withdrawn form the tanks. Compare, *Nashville, Chattanooga & St. L. Ry.* v. *Wallace, supra.* * * * *There it was pointed out that 'there can be no valid objection to the taxation of the exercise of any right or power incident to * * * ownership of the gasoline, which falls short of a tax directly imposed on its use in interstate commerce, deemed forbidden in Helson* v. *Kentucky,'* 279 U. S. 245. *As the exercise of the powers taxed, the storage and withdrawal from storage of the gasoline, was complete before interstate commerce began, it was held that the burden of the tax was too indirect and remote from the function of interstate commerce, to transgress constitutional limitations.*

"Despite the fact that the statute as applied is identical in operation with that sustained in *Nashville, Chattanooga & St. Louis Ry.* v. *Wallace, supra, respondent contends that as the statute is written, the tax is one on the consumption of gasoline in propelling its airplanes in interstate commerce, invalid under Helson* v. *Kentucky, supra.* In that case a Kentucky statute taxing the use of gasoline was applied to that purchased and placed in the tanks of a ferry boat outside the State for use in operating it in interstate commerce. The tax, which is levied only with respect to gasoline consumed while the ferry boat was within the State, was held to be invalid as, in effect, a direct tax on the privilege of carrying on interstate commerce."

It will be noticed in the above case that the Wyoming statute did not levy the tax on storage or withdrawal from storage. The tax was assessed on the use of the gasoline, just as the tax here involved is assessed on use. The Wyoming statute did not define the term "use." The contention was made there, as here, that the tax was on the use and that under the statute as written, the tax was on the consumption of gasoline used in propelling airplanes in interstate commerce and, therefore, invalid. The Court denied this contention and, quoting from the case of *Nashville, C. & St. L. Ry. Co.* v. *Wallace,* 288 U. S. 249, the Court said:

"*There it was pointed out that 'there can be no valid objection to the taxation of the exercise of any right or power incident to ownership of the gasoline, which falls short of a tax directly imposed on its use in interstate commerce, deemed forbidden in Helson* v. *Kentucky,'* 279 U. S. 245. *As the exercise of the*

powers taxed, the storage and withdrawal from storage of the gasoline, was complete before interstate commerce began, it was held that the burden of the tax was too indirect and remote from the function of interstate commerce, to transgress constitutional limitations."

In the above case the term "use" was not defined by statute. The Court nevertheless held that the term "use" implied the exercise of a right or power incident to the ownership of the property. We think this case sustains our contention that the word "use" means the exercise of a right or power incident to the ownership of property without a statutory definition to that effect. Therefore, when petitioner employed the imported articles for a purpose—the purpose of installation—under the decision in the above case, it exercised a right or power incident to the ownership of the property, and we think that the Court was clearly correct in so holding.

Counsel for petitioner further contend that it was not the intention of the Legislature under the 1937 Use Tax Act to lay a tax upon property or events prior to the commencement of interstate commerce. This contention is based on the fact that the Use Tax Act was revised by the Legislature in 1939 (Art. 12, Chapter 66, S. L. 1939). In that revision the term "use" is defined exactly as the term is denied in the California Act.

Subdivision (h) of Section 1 of the Act defines "use" as follows:

"The term 'use' means and includes the exercise of any right or power over tangible personal prop-

> erty incident to the ownership of that property, except that it shall not include the sale of that property in the regular course of business."

Counsel contend that this change in the revised Act of 1939 amounts to a legislative declaration that the term "use" could not be so defined under the old statute. This contention is based on the rule that the change in phraseology of an old statute by way of amendment creates a presumption of a change in legislative intent. This rule, however, has little if any force in changes of the character here involved. The rule is quite frequently followed where there is an amendment of a particular section of an old statute, where it is apparent that the amendment is made to cure a defect in the old law. It has very little force or effect in cases of this character where there is an entire revision of an Act. Nor has it any force where it is apparent that the change was made to express more clearly the original legislative intent. It must be borne in mind in this case that in making the revision, the Legislature in no way changed its prior definition of the word "use." This term was not at all defined in the old statute. Therefore, we think it apparent that the change was made for the purpose and with the intent to clearly define the term "use," rather than to indicate a legislative declaration that the term had no such meaning in the prior Act.

Speaking on this question, the Circuit Court, in its opinion (Tr. 64), said:

> "Thus the definitive provision of the statute in Oklahoma is identical with that contained in the statute of California. The argument is that the new

act demonstrated a legislative intent to make a substantial change in the then existing law; that it recognized a substantial difference between the tax levied by the two statutes; that it recognized the fact that the earlier act was not as comprehensive as the statute in California; and that taking notice of the decisions in Southern Pacific Company v. Gallagher, and Pacific Telephone & Telegraph Co. v. Gallagher, *supra*, it sought to change the statute to conform to that in California. It is a general rule of construction that by amending a statute the Legislature intended to make a substantial change in the preéxisting law. But like others, that rule has its exceptions. It is not every change in phraseology that indicates a desired change in substance and effect. It may be made for the purpose of expressing more clearly and accurately the same intent or to improve diction. Or it may be to meet a new and unanticipated condition brought about by judicial interpretation of the pre-existing law. And while the presumption to effect a change in substance is fairly strong in the case of an isolated, independent amendment, it has much less persuasive force in a case of this kind where the new enactment is a general comprehensive tax code. *State* v. *Wibaux County Bank*, 85 Mont. 532, 281 Pac. 341, certiorari denied, 281 U. S. 725. The case of *Pacific Telephone & Telegraph Co.* v. *Henneford, supra,* was decided in 1938, and the cases of *Southern Pacific Co.* v. *Gallagher,* and *Pacific Telephone & Telegraph Co.* v. *Gallagher, supra,* were decided early in 1939. We are unable to say that the enactment of the statute in 1939 indicated a legislative intent and understanding that the Act of 1937 was not sufficiently comprehensive in scope to impose an excise upon imported tangible property where retention and attributes of ownership were exercised over it between the termination

of its movement in interstate commerce and the beginning of its use and consumption in a business which is interstate in character. Instead, it is a reasonable presumption that the decisions in the three cases came to the attention of the Legislature at its session in 1939 and that to make assurance doubly sure the statute was thereupon amended in such manner as to bring it into parallelism with that in California. Rather than pointing to a legislative intent that the Act of 1937 did not warrant the laying of the tax now in dispute, the enactment of the subsequent act is indicative of a determined intent and purpose from the outset that the tax should be levied."

It is not our purpose at this time to enlarge upon what is there said. Suffice it to say that we are content, for the purpose of this brief, to rely thereon.

Counsel further contend that if the Act be construed as we contend it should be, then the tax here assessed is an ad valorem tax and is laid in violation of Article 10, Section 9 of the Constitution of the State of Oklahoma, as amended August 15, 1933, which provides that no ad valorem tax shall be levied for state purposes. The tax, however, in no event can be construed as an ad valorem tax. The nature of the tax was passed upon by the Supreme Court of the State in the case of *Oklahoma Tax Commission* v. *Sisters of the Sorrowful Mother,* 186 Okla. 339, 97 Pac. (2d) 888.

The court in that case held the 1937 Use Tax an excise tax and, in discussing the nature of the tax, said:

"It is an excise tax which the state is authorized to exact, and in connection with the 'Consumers Tax

> Act' it has for its primary purpose raising revenue for state purposes. It is particularly designed to prevent consumers escaping payment of the sales tax by going outside the state and purchasing tangible personal property in any one month in excess of the value of $100, and bringing same into the state for their use or consumption."

Counsel, however, contend that if the tax be construed as an excise tax, it is clearly unconstitutional. In answer to this contention we call the Court's attention to the fact that in the case of Edelman v. Boeing Air Transport, Inc., *supra,* this Court treated the tax as an excise tax. The tax there, as here, was on the use. The term "use" was not defined by the Act. The Court nevertheless sustained the assessment. We think the facts in that case are identical with the facts in this case and completely answer the contention of counsel that if the tax be an excise tax, the assessment is invalid.

Most of the cases relied upon by counsel for petitioner were distinguished by the Circuit Court in its opinion, and were likewise distinguished by this Court in the cases herein cited and relied upon.

Counsel place great stress on the case of *Pacific Telephone & Telegraph Company* v. *Henneford,* 195 Wash. 553, 81 Pac. (2d) 786. This case apparently sustains their contention. The opinion, however, we think in conflict with the opinions of this Court in the cases herein cited and is, therefore, not controlling. Counsel also call attention to the fact that this Court denied certiorari in the above case (306 U. S. 673). We do not think any im-

portance should be placed on the fact that this Court refused to review the decision of the Supreme Court of Washington in that case. It was not necessary to a decision that the State Supreme Court should have decided the Federal question there involved.

It was also contended in that case that the Washington Act levied a compensating tax; that the property sought to be taxed under the Act could not be procured or purchased within the State of Washington; and that the Act in question did not levy a use tax on such property. After having decided that the Act in question did not levy a use tax on the use of the property therein involved, it was not necessary to pass upon the Federal question as a decision in favor of the company on the State question involved effectively disposed of the case. Therefore, even though this Court had granted certiorari and at final hearing arrived at a different conclusion from the Washington court on the Federal question, it would have availed the State nothing, as the State would still have been precluded from collecting the tax because of the conclusion reached by the Supreme Court of the State on the State question.

In these circumstances this Court invariably refuses to assume jurisdiction and review the case. We, therefore, contend that the fact that certiorari was denied is not even persuasive here, much less controlling. The above case, however, as to the State question decided, was subsequently overruled by the Supreme Court of Washington in the case of *City of Spokane* v. *Washington*,

89 Pac. (2d) 426. The Federal question, however, discussed in the former case, was not discussed in this case. The case was overruled only as to the State question involved. However, the original opinion was still in full force and effect at the time this Court denied certiorari.

We submit that the Circuit Court of Appeals for the Tenth Circuit arrived at the correct conclusion and the writ should be denied.

Respectfully submitted,

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